आयकर अपीलीय अधिकरण "डी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

श्री आय.पी. बंसल, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI I. P. BANSAL, J. M. AND SHRI SANJAY ARORA, A. M.

आयकर अपील सं./I.T.A. No. 2415/Mum/2011
(**निर्धारण वर्ष** / Assessment Year: 2003-04)

Dynatron Private Limited, 20 Silverstand Bunglows, Dariyamahal CHS Ltd., Juhu Tara Road, Juhu, Mumbai-400 049	**बनाम** / Vs.	Dy. CIT, Range 8(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACD 0529 J		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by**	:	Shri Ajay R. Singh
प्रत्यर्थी की ओर से/**Respondent by**	:	Mrs. R. M. Madhavi

सुनवाई की तारीख / **Date of Hearing**	:	14.05.2013
घोषणा की तारीख / **Date of Pronouncement**	:	29.05.2013

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-16, Mumbai ('CIT(A)' for short) dated 22.02.2011, partly allowing the levy of penalty u/s.271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) in its case for the assessment year (A.Y.) 2003-04 vide order dated 30.03.2009.

2.1 Opening the arguments for and on behalf of the assessee, it was submitted by the ld. AR, its counsel, that penalty u/s.271(1)(c) stood levied by the Assessing Officer (A.O.) on three counts, i.e., depreciation on motor car (Rs.0.01 lakhs); royalty payment (Rs.6.20 lakhs); and fees for technical services (Rs.4.53 lakhs). It is only the last amount which concerns the present appeal inasmuch as the assessee stands allowed relief by the first appellate authority *qua* the first two amounts, and which has not been appealed against by the Revenue. With regard to the facts in relation to the fees for technical services (FTS), the disallowance has been effected u/s.40(a)(ia) on account of non-payment of TDS. The said section has, in fact, suffered amendments, as by Finance Act, 2010 w.e.f. 01.04.2010, so that the disallowance no longer obtains where the tax deductible has been paid to the credit of the Central Government on or before the due date of the filing of the return u/s.139(1) of the Act. In the instant case, the TDS in the required sum of Rs.95,333/-, though payable by 30.05.2003, stood paid by 20.11.2003, i.e., before the due date of filing the return of income u/s.139(1), being 30.11.2003. The said amendment has, in fact, been considered as retrospective by the hon'ble Calcutta High Court in the case of *CIT vs. Virgin Creations* (in ITA No.302 of 2011 dated 23.11.2011), placing a copy of the same on record. Under these circumstances, no penalty ought to have been levied; the disallowance being only on account of a technical default of delay in payment.

2.2 The ld. DR, on the other hand, would submit that the assessee's case fails on the ground of *bona fides*, inasmuch as the tax was not deducted and paid in spite the tax auditor reporting per his report that the tax at source was deductible. Further, though not eligible as per the clear mandate of law, it claimed the deduction for the current year, which was eligible to it only for the subsequent year. It is the return of income for the current year, per which the impugned deduction had been claimed, that the assessee is required to explain in the penalty proceedings. *Further, how could the assessee at the relevant time, i.e., the filing of its return of income, predicate a subsequent amendment in law and that too retrospectively, so as to now claim relief on its basis*. The assessee's

case is *de hors* any explanation, with its *bona fides* in doubt, also for the reason that it makes no mention of the payment in the return. It was only on being pointed out by the A.O. during the assessment proceedings, and it is not that every return is subject to scrutiny, that the assessee accepted its mistake and agreed for the disallowance. The default of concealment or furnishing inaccurate particulars of income has to be considered with reference to the return of income as filed. Accordingly, the penalty has been rightly confirmed by the ld. CIT(A).

3. We have heard the parties, and perused the material on record.

3.1 At the outset, we express our displeasure and discountenance the argument advanced and/or the position assumed by the assessee's counsel before us. The disallowance under reference is u/s. 40(a)(i), i.e., *qua* the payment to a non-resident, and not u/s.40(a)(ia). Not only did he, thus, mislead the court on facts, the legal plea raised, i.e., with reference to the deposit of TDS before the due date of the filing of the return of income for the relevant year, is misplaced inasmuch as there is no reference to this date in the relevant provision, either with regard to the allowance for the year to which the liability relates or for a subsequent year. The ld. DR also, we are afraid to say, did not bring this fact to our notice; rather, argued the matter on the basis as if the disallowance under reference was u/s. 40(a)(ia).

The relevant provision (s. 40(a)(i)) provides for the disallowance of specific sums payable to non-residents, where tax, deducible at source under Chapter VII-B, has not been deducted and deposited to the credit of the Central Government within the time prescribed u/s.200(1). Further, the section is not absolute in its terms, and provides for the allowance thereof in the year of payment, i.e., where the tax stands deducted and paid after expiry of the time prescribed u/s.200(1). There is, as such, no reference or correlation with the due date of the filing of the return by the assessee-deductor u/s.139(1), with reference to which the assessee pleads its case before us. The terms of the section are clear. What, therefore, is relevant is the explanation that the assessee has furnished for the default under reference leading to the disallowance in its case.

3.2 In our view, the facts as stated by the ld. CIT(A), rather than being adverse to the assessee, as far as the levy of the penalty u/s.271(1)(c) is concerned, favour it. This is as it is clear that the assessee was of the clear view that tax was not deductible on the said payment. Accordingly, neither any tax stood deducted, nor paid to the credit of the Central Government. It is only subsequently, on being so pointed out by the tax auditor, that the said default came to light, and the assessee realized his mistake in having not deposited the tax on the impugned sum. The matter stands duly reported by the tax auditor in his report u/s.44AB, and which accompanies and forms part of the assessee's return of income. How could, therefore, it be said that the assessee has not disclosed the correct particulars of its income. Further, following the advice of its tax advisor, as it appears to us, tax has also been deposited to the account of the Government on 20.11.2003, prior to the filing of the return for the relevant year on 27.11.2003. True, the assessee ought to have, in view of the deeming provision of section 40(a)(i), disallowed the same *suo moto* per its return of income, also stating the reasons that lead to the default in the first place. So however, it cannot be denied that there was nothing false in the assessee's claim of deduction inasmuch as the tax stood deducted, albeit belatedly, and credited to the account of the Central Government. The assessee, as apparent, was under the *bona fide* belief that having deposited the tax prior to the due date of the return for the relevant year, no disallowance *qua* the same was exigible. It is open to the assessee to raise a legal claim. However, as long as the primary facts stand clearly and correctly stated in the return of income, and only with reference to which the Revenue gathers the information leading to the disallowance, it can be said that pressing a claim which is not sustainable in law ought not to lead to levy of penalty. It is for this reason that the assessee's stand of having deposited the tax prior to the date of the filing of the return for the relevant year becomes relevant. The deposit of the tax establishes the assessee's *bona fides* in the matter, so that the disallowance becomes at best a technical default, leading to a disallowance for one year and a corresponding allowance for the immediately succeeding year. Though a proper note, explaining its stand, in our view, would have been the proper course for the assessee to follow, so as to avoid any adverse inference, in

our view, the *bona fides* of the assessee's conduct are exhibited by the payment of TDS soon after the default stood brought to its notice by its tax auditor, per the auditor's report which forms part of its return. The same would weigh in favour of the assessee, so as to constitute a reasonable explanation in terms of *Explanation* (1B) to section 271(1)(c), saving penalty.

3.3 We may clarify, we are acutely aware, that it could well be argued, and not without merit, that merely because a claim (per the return of income) is a legal claim, or has a legal aspect to it – which would be in each case – the same by itself cannot be a cause for non levy of penalty in every case, as where there is no valid basis for the same (i.e., the legal claim). That is, the claim must rest on some reasonable premises or basis, i.e., have some basis to it. In *CIT vs. Escorts Finance Ltd.* [2010] 328 ITR 44 (Del), the hon'ble court found the assessee's claim u/s.35D, said to be based on the opinion of its Chartered Accountant, a tax expert, as without basis in view of the clear language of the provision, extending the benefit of the said deduction to an industrial company, while the assessee-respondent was admittedly a finance company. In *CIT vs. Zoom Communication (P.) Ltd.* [2010] 327 ITR 510 (Del.), the claim was *qua* income-tax, barred by section 40(a)(ii), so that the plea of 'omission' was considered as not acceptable. In *CIT vs. Usha International Limited* [2013] 214 Taxmann.com 519 (Del), again, the claim was u/s.35CCA, which was found as *de hors* any basis. Penalty u/s.271(1)(c) of the Act was accordingly confirmed in all these cases by the hon'ble court, confirming thus that furnishing of a plausible explanation for default continues to be the building block or an essential ingredient for saving levy penalty u/s.271(1)(c) of the Act, and would apply even in respect of legal claims and, further, even after the decision in the case of *CIT vs. Reliance Petroproducts Pvt. Ltd.* [2010] 322 ITR 158 (SC), which decision was considered in these cases.

So, however, in the instant case, the deposit of TDS subsequently would operate as a mitigating factor. Though admittedly of little consequence in-so-far as the claim for deduction (as made per the return of income) for the relevant year is concerned in view of

the clear language of the provision, it serves as a substantial compliance thereof. No doubt, it does not explain the basis of the claim for the current year; the provision itself providing for the contingency and consequence of delayed payment, deferring the claim to the year of actual payment – the fact remains that the deduction becomes exigible for the subsequent year. The terms of section are thus, as afore-noted, not absolute, so as to render the subsequent payment of TDS as of no consequence. *The assessee would be entitled to claim the deduction for the immediately succeeding year, and which it has ostensibly not.* In terms of the provision itself, therefore, it becomes a case of satisfaction of the principal condition for deduction, i.e., the payment of TDS, though subsequently. It is this that prompted us to state of the provision as having been substantially complied with. It would decidedly be a different matter if the provision made no such exception, as in that case there would be no question of the principal condition of the payment having been met and, thus, of the assessee being substantially compliant. This, therefore, serves as a valid explanation under *Explanation* (1B) to section 271(1)(c).

3.4 We may also, before parting, state that though the assessee may not have explained its case in this manner; the counsel, rather, misleading the court, the same is firstly borne out of the relevant law as well as the assessee's conduct; it stating the primary facts in the course of the assessment proceedings itself, and on which no doubt has been expressed by the Revenue at any stage. In our clear view, therefore, this is not a fit case for levy of the penalty u/s. 271(1)(c) *qua* the non deduction of tax on the FTS payment of Rs. 4,52,538/-. We decide accordingly.

4. In the result, the assessee's appeal is allowed.

परिणामतः निर्धारिती की अपील स्वीकृत की जाती है।

Order pronounced in the open court on 29th May, 2013

आदेश की घोषणा खुले न्यायालय में दिनांकः को की गई ।

Sd/-	Sd/-
(I.P. BANSAL)	(SANJAY ARORA)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांकDated : 29.05.2013

व.नि.स./Roshani , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**